IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A295/2010

DATE: 4 NOVEMBER 2011

In the matter between:

KWANELE MATYWATYWA Appellant

and

THE STATE Respondent

J U D G M E N T

LOUW, J:

The appellant, who was represented throughout by a legal representative, pleaded not guilty on 1 October 2007 in the Regional Court held at Thembalethu, George, to a main charge of rape of the complainant, Nandipa Muggels, on 21 June 2006 and an alternative charge under section 14(1)(a) of Act 23 of 1957, that is of sexual intercourse with a girl under the age of 16 years. The charge sheet alleged that the complainant was 15 years old at the time of the incident.

The plea-explanation given on behalf of the appellant was that he denied having sexual intercourse with the complainant. On 6 March 2009, the appellant was convicted on the main charge of rape and on the same day he was sentenced to 15 years imprisonment. On 15 May 2009, the appellant was granted leave to appeal against the sentence by the court *a quo*, who refused leave to appeal against his conviction. On 15 August 2011, the appellant was given leave, on petition by this court, to appeal against his conviction also.

The first issue is the age of the complainant. Her mother testified that she was born on 29 August 1989. At the time of the incident, the complainant was, therefore, 16 years and 10 months old, not 15 years old as alleged in the charge sheet. The alternative charge of sexual intercourse with a girl below the age of 16 years consequently fell away. The next issue is whether the complainant, who purported to testify under oath, was a competent witness. Mr Maartens, who appeared on behalf of the appellant, submitted, for the reasons more fully discussed hereunder, that the complainant was not a competent witness and consequently what she said during her testimony before the court *a quo*, was not evidence which can be taken into account.

The complainant testified on 1 October 2007. She stated that

she was 17 years old. However, given the later evidence of her mother, she was 18 years old at the time she gave evidence. Before she gave evidence, the magistrate asked the complainant whether she had any objection to taking the prescribed oath, she replied, "what is it to take the oath, Your Worship?". This reply prompted the magistrate to question the complainant. In response the complainant stated that although she was no longer at school, she had passed Standard 7, that she did believe in God, that the soul of a person who dies goes to heaven and that the soul of a bad and lying person goes to Satan.

In response to further questioning by the magistrate, she stated that she understood that if she swore by the name of God, she swears to speak the truth and that she cannot lie. Pursuant to these questions and answers, the complainant was administered the oath. Mr Maartens submitted that the oath was not competently administered. The questioning by the magistrate, firstly, did not establish whether the complainant was able to appreciate the difference between the truth and untruth and secondly, it was not established that the complainant understood the nature and import of the oath.

Section 162(1) of Act 51 of 1977 must be read with section 164(1) of the Act. Section 162 provides generally that a

witness in criminal proceedings shall not testify unless he or she does so under oath. Section 164 provides that where a person is found not to understand the nature and import of the oath, such person may nevertheless testify without taking the oath, provided the person is admonished by the presiding officer to speak the truth. At the time when the complainant testified, section 164(1) required the ignorance of the nature and import of the oath to have risen from "youth defective education or other cause".

In this case I am satisfied that the magistrate was correct in concluding that the complainant was of such intelligence and maturity to distinguish between truth and lies. She had left school after passing the 9th Grade, and although the magistrate was, at the time, under the impression that she was only 17 years old, she was in fact 18 years old. There was nothing in the responses to the questioning by the magistrate to suggest that she was not able to distinguish between the truth and a lie or that she did not, after the magistrate's explanation, understand the nature and import of the oath. In my view the complainant was, therefore, a competent witness and her evidence can and must be taken into account.

The complainant testified that she and a girl friend, Alwethu, went to the Rio Tavern in Thembalethu during the afternoon of

20 June 2006. There she joined her friend, Yandiswa and other friends. The others drank, but she did not drink at all. They remained at the tavern until 1 a.m. the next morning, when she left for home with her two friends. Yandiswa soon went her own way and the complainant and Alwethu continued further past the train station. They met up with the appellant and one Lons, both of whom they had seen earlier at the tavern. She knew the appellant, because he was the boyfriend of her niece, Nosise.

The appellant and Lons proceeded to chase the complainant and her friend, Alwethu. The appellant came after the complainant and near a shop called Seko, he caught up with her, grabbed and twisted her arm and took her into the back garden of a nearby house. He pushed her down on to the ground, undressed her and himself and when she cried and resisted, he hit her with his open hand in the face. He then proceeded to rape her.

After he had finished, he said that she must not tell her niece, Nosise, what had happened and that in any event if she did tell anyone, no one would believe her. On her way from the scene, the complainant saw a police van in a street and her friend, Nosifosethu and one Sampies, talking to the police. There appeared to be some argument.

Appellant, who was also present, came running towards her and said that she must not say anything and must simply make as if nothing had happened. She did not go to the police and report the incident. She said that she was afraid to tell the police what had happened. She went instead to the house of her sister, Yaniswa. She says that it was still dark, although she did not know what time it was. Her brother opened the door for her and she went into her sister's bedroom. Initially she said nothing, but when she started crying, her sister asked what the problem was. She then told her sister that the appellant had raped her. Initially her sister said that she was lying, but when she insisted that it did happen, her sister said that they should go to the police station.

The complainant went to the police and later that day she was examined by Dr Jenkins at the George Hospital. The complainant made a statement to the police dated 22 June 2006. Under cross-examination the complainant was asked whether the police had asked her whether what they had written down was correct, she answered yes. She was not asked in terms whether the statement was first read back to her and she did not say that it was. Certain differences between her statement and her evidence in court was put to her.

In particular certain things which she said in evidence, were not recorded in the one page statement. She said that she did tell the police the full story, but the police had not written down everything she had told them and had in fact not read the statement back to her before she signed. In my view the differences between her statement to the police and her evidence before the court are trifling and of no consequence and certainly not as Mr Maartens suggested in heads of argument, troubling. Her basic story remained the same.

The complainant's sister testified that the complainant came to her house at about 9 a.m. of the morning of 21 June. She was sober and told her sister that the appellant had come from behind and said to the complainant's friends that they must walk ahead and that he wanted to talk to her. He then took her to a place where there was grass, where he raped her. The complainant said that the appellant had told her not to tell anyone and not to tell his girlfriend. The complainant's sister confirmed under cross-examination that the complainant started crying only after she had come there.

There are discrepancies between the version given by the complainant in court and the version her sister says was given to her by the complainant the next morning. The complainant and her sister also differed as to the time when she came to

her sister's house and also whether her brother opened the door for her. Despite the differences, the basic story told by the complainant in court is what she told her sister the next morning. Such differences as there are, are in the nature to be expected almost three years after the event.

Dr Jenkins testified that he examined the complainant at the George Hospital at twenty past four on the afternoon of 21 June 2006. She was quiet but upset. He found a bruise on her right arm and three fresh tears in her vagina. The tears were consistent with the use of force during intercourse and with forceful penetration. The tears were not of the kind normally found when intercourse is by consent he opined.

During the course of his examination, Dr Jenkins took two specimens from the complainant, the first was a vaginal smear and the second was a blood sample of the complainant. He sealed these items with numbered official seals. He read out and confirmed the numbers in evidence. He handed the samples to the investigating officers, one Dawie van Rooyen, who did not testify. There is no direct evidence as to what happened to these samples thereafter.

The final piece of evidence relied upon by the state, is an affidavit in terms of section 212 of the Criminal Procedure Act

by one Sergeant Davids, who is an assistant forensic analyst attached to the biology unit of the Forensics Science Laboratory of the South African Police. The affidavit records that two blood samples and one vaginal vault swab were analysed by Davids and that the result was that the DNA on the swab matched the DNA of the blood samples. The one blood sample was marked with a number and the name N Muggels, which presumably intended to refer to the complainant and the other was marked with the name of the appellant and was presumably intended to refer to him.

On the basis of this evidence, read with certain statements made by the appellant's legal representative, the state contends that traces of the appellant's DNA were found inside the complainant's vagina. This, so it is contended, corroborates the complainant's version that intercourse did take place and negates the appellant's denial that intercourse did take place between them.

I agree with Mr Maartens, who submitted in his heads of argument, that the haphazard and incompetent manner in which the DNA evidence was presented, renders it of no value to the state in this case. In the absence of direct evidence, the prosecutor sought admissions from the appellant's legal representatives in regard to:

"The chain of evidence regarding the drawing of the accused's blood and the packaging and forwarding of the exhibits".

To this the appellant's representative replied as follows:

"First of all, Your Worship, we have no objection regarding the report, DNA report, it was handed up. We had insight into the contents, Your Worship, and the contents were also communicated to the accused this morning. Then, Your Worship, the defence is not going to put the chain into dispute, Your Worship."

The magistrate then required the appellant's representative to state:

"Whether they are admitting that the blood was correctly drawn. That it was kept safely and then that it was delivered to the laboratory still safely without the possibility of contamination."

To this the legal representative replied:

"Okay then, Your Worship, first of all then the

defence will admit that the accused, the process whereby the accused's blood was drawn, was proper, that it was kept in a safe place and that it was delivered safely to the laboratory and kept there in a safe place without contamination."

From this it is not clear that the admissions were in fact made by the appellant in regard to what happened to the vaginal vault smear and the complainant's blood which was drawn, sealed and give a number by Dr Jenkins and handed to Dawie van Rooyen. The appellant did admit that the blood sample taken from him was correctly and safely delivered to the laboratory. In this regard it is important to note that the correspondence which accompanied the section 212 affidavit, as well as the affidavit itself, referred to a laboratory number which does not, in any manner, correspond with the seal numbers noted by Dr Jenkins.

DNA evidence in general, and in particular in cases of this nature, is an extremely important tool in the hands of the prosecution. It is, however, rendered entirely useless if the evidence is not properly presented. If the state wishes to obtain admissions from the accused, it must be done in a proper and structured way so that it eliminates the need to call the various witnesses involved.

The fact that the appellant's legal representative stated that the defence had not objection regarding the DNA report, does not help the state if the report itself is contradictory and its contents cannot beyond a reasonable doubt be linked to the complainant. The appellant's legal representative stated no more than the defence was not going to put "the chain into dispute".

Because of the terms in which the admission was couched, it is not clear at all whether he did so in respect of the specimens taken from the complainant or whether he did so only in respect of the drawing of the appellant's blood and the packaging and forwarding of the appellant's blood. The admission is at least equivocal or ambiguous and it is not clear that the "chain" in respect of the specimens taken from the complainant, was admitted. In the circumstances the state has not established that traces of the appellant's DNA was found in the complainant's vagina. See also pages 80 to 81 of the record where the admissions were revisited.

The appellant testified. According to his evidence in chief, he had met the complainant at the tavern, but although they all left together, they went their separate ways to their homes. One of his friends had an argument with his girlfriend, as a

result of which the police was called. While he was standing with the police, the complainant walked past, whereupon they all went home. He denied having sexual intercourse with the complainant. During cross-examination he stated that he had forgotten to mention in chief that he and the complainant first went to his home, where they both lay naked on his bed, but did not have intercourse. He insisted throughout that he did not rape or have intercourse with the complainant.

The appellant's account of what happened was not put to the complainant and is so inconsistent that it can safely be rejected. However, I agree with Mr Maartens, that the fact that the appellant clearly adapted his evidence as he went along, does not relieve the state of proving its case beyond reasonable doubt. The state must still prove that intercourse occurred without the consent of the complainant.

The complainant's version was put in dispute by the appellant's plea and plea-explanation. There is corroboration for her version in the objective circumstantial evidence of vaginal injuries found by Dr Jenkins. The appellant's version is that no penetration occurred. There is, therefore, only the complainant's version of how she could have suffered the vaginal injuries she did. It was not suggested to her that she was raped by someone else or even that she had consensual

sex with someone else, or that she was injured in some other way.

Mr Maartens, in argument, went no further than to suggest that the injuries could, on Dr Jenkins' evidence, still have been caused by consensual intercourse. The problem is, however, that there is no evidence, not even from the appellant that he had consensual intercourse with the complainant. In addition, the evidence of her sister that she reported the incident to her the next morning, is consistent with her version that the appellant had intercourse with her without her consent. In my view the appeal against the conviction must fail.

At the time of the commission of the offence, the appellant was 21 years old. At the time he was sentenced he was 23 years old and had two children. The one child was eight years old and the other three years old. He left school in Grade 11 and lived with is sister and her husband. He had enrolled at a college in Germiston for further studies. This, so it was argued and was also accepted by the magistrate, showed that there is a prospect of rehabilitation. The appellant had one previous conviction for an assault which was committed during October 2004 and in respect of which he was sentenced to R200,00 or 20 days imprisonment.

In considering the appropriate sentence, the magistrate

misdirected himself in respect of the age of the complainant. He overlooked the import of the mother's evidence and wrongly approached the issue of sentence on the basis that the complainant was 15 years old at the time of the commission of the offence and that consequently, the minimum sentence legislation required the imposition of life imprisonment in the absence of substantial and compelling circumstances justifying a lesser sentence.

The magistrate then considered the issue and found substantial and compelling circumstances. Having found that the court could deviate from life imprisonment, in this case the magistrate proceeded to sentence the appellant to 15 years imprisonment. In fact because the complainant was older than 16 years at the time, the applicable prescribed minimum sentence was 10 years imprisonment. Because of this fundamental and material misdirection, this court is required to reconsider the question of what would be an appropriate sentence.

The appellant took a young girl of 16 years and 10 months by force to a secluded place where he assaulted and raped her. There is no direct evidence of what effect the incident has had on her, but it is common cause, I think, that she has and will continue psychological consequences of what had been done

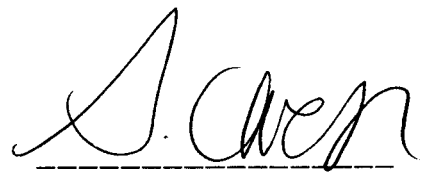
to her. Having said that, it is clear that this case does not fall in the category of aggravated sexual assaults far too often encountered in these courts where physical injuries and mental consequences are devastating and in some cases truly horrific. Mr De Jongh, who appeared for the state, conceded that this court should interfere with the sentence imposed.

In my view, and having regard to the seriousness of the offence, the personal circumstances of the appellant, which includes, in addition to the factors mentioned earlier, that although he was on bail awaiting trial and sentence, he had the uncertainty and anguish of the impending trial hanging over his head for almost three years, a sentence of 10 years imprisonment would be an appropriate sentence. I would, therefore, make the following orders:

1. The appeal against conviction is dismissed and the conviction is confirmed.

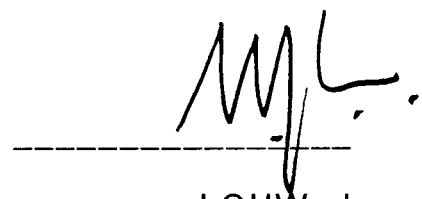
2. The appeal against sentence succeeds and the sentence of 15 years imprisonment is set aside and replaced by the following sentence: **10 (TEN) YEARS IMPRISONMENT, WHICH COMMENCES ON 6 MARCH 2009, BEING THE DATE OF SENTENCE IN THE COURT *A QUO***.

I agree:



CLOETE, AJ

So ordered:



LOUW, J